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April 21, 2017

The Honorable Alison J. Nathan
United States District Judge
Southern District of New York
40 Centre Street
New York, New York 10007

Re: United States v. Jose Rodriguez, *et al.*
15 CR 95 (AJN)

Dear Judge Nathan:

Please accept this letter as Defendant Jose Rodriguez's Supplemental Sentencing Submission, filed in response to the Government's submission of April 19, 2017. Sentencing is scheduled for April 24, 2017.

As the Court knows, the parties stipulated to a Guidelines sentencing range of 106-117 months imprisonment. The agreement provided further that the Defendant could seek a downward departure under §5K2.23 for the 41 months he spent in New York State prison for possession of a weapon, for which conduct he now faces an additional 60-month minimum sentence under Count 4.

While one would not realize it from reading the Government's sentencing submission, the Government agreed not to oppose this departure. (Plea Agreement, p. 4, "[T]he parties agree that…the defendant may seek, and the Government will not object to, a downward departure from the Stipulated Guidelines Range pursuant to 5K2.23, based on the term of imprisonment described above in subparagraph B(2), on the ground that the offense constitutes relevant conduct to, and is part of, the offense charged in Count One." But the Government's sentencing submission, while utterly silent on its agreement "not to object," is instead quite loquacious about its disagreement with the Defendant's request: "The Government disagrees, and respectfully requests that the Court impose a sentence within the range of 106 to 117 months' imprisonment to which the parties stipulated…," (p. 1); "A sentence within the stipulated Guidelines range is necessary to meet the statutory sentencing factors," (p. 10); "[T]he Government respectfully requests that the Court impose a sentence within the range of 106 to 117 months (p. 10)."

As such, it appears to violate the precepts set forth by the Second Circuit in *United States v. Vaval,* 404 F.3d 144 (2d Cir. 2005)("[W]e construe plea agreements strictly against the government and do not 'hesitate to scrutinize the government's conduct to ensure that it comports with the highest standard of fairness.' *United States v. Lawlor,* 168 F.3d 633, 637 (2d Cir. 1999). 'To determine whether a plea agreement has been breached, a court must look to what the parties reasonably understood to be the terms of the agreement.' (*Id.* at 636 (internal quotation marks and citation omitted). Moreover, because plea bargains require defendants to waive fundamental constitutional rights, prosecutors are held to meticulous standards of performance. *Id.*")

I have raised this issue with the Government counsel. I am informed that the Government in fact does not object to the 5K2.23 departure, but instead seeks an upward variance under 18 U.S.C. §3553, presumably a day-for-day upward variance from the range as adjusted for the downward departure it "consents" to. Thus construed, the Government's position violates only the spirit, if not the letter, of the plea agreement.[1] This is not entirely a semantic difference, however. For the guidelines have an "anchoring" effect, and for a party to argue for a variance from the otherwise applicable range is different from merely asking for a sentence within the range, because the former requires a showing of some additional aggravating or mitigating factor that the latter does not.

In Mr. Rodriguez's case, there has been no such showing. The government relies on his role in the offense, and his possession of weapons. (Government Submission, pp. 9-10). But these are the very factors that are already built into Mr. Rodriguez's sentencing guidelines; they are the very reasons that he now faces an additional minimum 60-month term for possessing the weapon that he already served 41 months in prison for. Furthermore, it would be nonsensical to conclude that an organization role enhancement would simultaneously justify an upward variance under §3553.[2]

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[1] By which I mean that an agreement verges on meaningless if it provides that the Government can effectively oppose that which it simultaneously agrees not to oppose.
[2] In the analogous context of departures, the Guidelines explicitly forbid an upward departure for role where role has already resulted in an upward adjustment under §3B1.1 (*see* §5K2.0(d)(3)).

For these reasons, the Government's request for a §3553 variance should be denied.

Respectfully submitted,

David Wikstrom